1894 Realty, LLC v Christopher
2016 NY Slip Op 31448(U)
July 22, 2016
Supreme Court, New York County
Docket Number: 650853/13
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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1894 REALTY, LLC and 1893 EASTCHESTER ROAD CORP.,

INDEX NO. 650853/13

Plaintiffs,

-against-

GERALD CHRISTOPHER d/b/a GOOD TO GO RESTAURANT,

Defendant.

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JOAN A. MADDEN, J.:

In this is action for past due rent and other charges under a lease for commercial premises located at 1894 Eastchester Road, Bronx, New York, plaintiffs move for an order pursuant to CPLR 3212 granting summary judgment against defendant in the amounts of $35,000 for base rent, $18,282.11 for water and sewer charges, and $3,145.44 for fire-prevention inspection fees. Plaintiffs also move for partial summary judgment on their claim for attorney's fees and a hearing as to the amount, and for dismissal of defendant's affirmative defenses. Defendant opposes summary judgment, but not the dismissal of his affirmative defenses. As determined below, plaintiffs' motion is granted in part and denied in part.

On a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to establish the absence of any material issues of fact. See CPLR 3212(b); Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980); Meridian Management Corp v. Cristi Cleaning Service Corp,

70 AD3d 508, 510 (1st Dept 2010). "Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers." Winegrad v. New York University Medical Center, supra at 853; accord Oddo v. Queens Village Committee, 135 AD3d 211 (1st Dept 2015). If the proponent satisfies its burden, the burden shifts to the opponent to "show facts sufficient to require a trial of any issue of fact." CPLR 3212 (b); see Zuckerman v. City of New York, supra at 562.

In support of the motion, plaintiffs submit an affidavit from Ellyn Bank, the Managing Member of plaintiff 1894 Realty, LLC and the President of plaintiff 1894 Eastchester Road Corp., as to the terms of the lease, defendant's obligations and his defaults. Ms. Bank states that in or about April 2007, 1894 Eastchester LLC and 1894 East LLC, entered into a lease with Gerald Christopher as tenant, for the use and occupancy of the store premises located at 1894 Eastchester Road, Bronx, New York, as a restaurant. She states that pursuant to paragraph 40 and an "unnumbered paragraph" of the lease, defendant agreed to pay base rent in the amount of $5,000 per month; between July 2010 and July 2012, defendant was required to make 25 payments for a total of $125,000; plaintiffs received 18 checks totaling $90,000, so defendant owes $35,000 in back rent.

Ms. Bank also states that pursuant to paragraph 18 of the lease, defendant agreed to pay for the water he consumed and the sewer charges imposed on the premises. She states that "[b]ecause the water and sewer charges were not paid, a lien was filed against the Premises," and by check dated February 21, 2012, "I paid $21,427.55 to the New York City Department of Finance to remove the lien." Ms. Bank further states that in November 2011, defendant applied to the Department of Buildings (DOB) for permits to perform work on the premises in which "he

falsely listed himself as the 'owner.'" She states that the application included a request for a permit to install an HVAC unit, and "[a]s a result of the issuance of a permit for an HVAC unit, plaintiffs were required to pay Fire Inspection Prevention Fees." She annexes an invoice the New York City Department of Finance which purportedly shows an "assessment" for fire-inspection prevention fees totaling $3,074.91.

In response to defendant's allegation that he is not responsible for the amounts sought in this action since no demands were made of him, Ms. Banks states that "either I or my attorneys sent defendant demand letters on September 3, 201, September 20, 201, October 11, 2011, October 14, 2011, February 1, 2012, February 12, 2012 and April 12, 2012." Ms. Banks also responds to defendant's allegation that plaintiff "assigned rights or interests in the premises and the tenancy without reservation of any rights." She states that "[a]ll monies demanded in the complaint accrued and became due prior to that date and Plaintiffs retained they right to recoup the same [and] did not assign any of their rights to the monies sought in the complaint herein to the present owner of the Premises or to anyone else."

Plaintiffs also submit the following documents: the pleadings; the lease dated April 2007 between 1894 Eastchester, LLC and 1894 East LLC as landlord/owner and Gerald A. Christopher as tenant, for a 12-year term running from May 1, 2007 through June 30, 2019; copies of 18 checks drawn on the account of Good to Go Enterprises LLC, one payable to plaintiff 1894 Eastchester Road Corp. and the others all payable to Ellyn Bank; a check in the amount of $21,427.55 dated February 14, 2012 drawn on the account of plaintiff 1894 Realty LLC and payable to "NYC Dept of Finance"; an application dated November 9, 2011, by architect Gino Longo for a NYC Department of Buildings ("DOB") permit for work at 1894 Eastchester Road,

describing the "job" as "interior renovation of existing retails space and office as per plans herewith filed" and listing defendant Gerard Christopher as "owner"; DOB documents showing the issuance of several work permits for the premises in November and December 2011; a document from the NYCServ website showing amounts due of $2,416 and $658.91 for "Fire-Prevention Inspection" in November 2011; the parties' discovery demands and responses; the court's discovery orders; plaintiffs' demand letters; and the deed for the property dated July 31, 2012, showing the transfer from 1894 Realty LLC to 1894 Eastchester Professional Building Ltd.

Based on the lease, Ms. Bank's affidavit and copies of defendant's rent checks, plaintiffs have sufficiently established prima facie that defendant owes a total of $35,000 in base rent for the period from July 2010 to July 2012. Plaintiffs, however, have failed to make a prima facie showing with respect with their claims for water and sewer charges, and fire-prevention inspection fees.

First as to plaintiff's claim for water and sewer charges, in her affidavit, Ms. Banks, plaintiffs' officer, admits that "pursuant to paragraph 18 of the Lease, Defendant agreed to pay for the water *he consumes* and for the sewer charges imposed on the Premises" (emphasis added). Ms. Banks states that New York City filed a lien against the premises for unpaid water and sewer charges, and on February 12, 2012, she issued a check in the amount of $21,427, 55 to the New York City Department of Finance "to remove the lien." Although plaintiffs submit a copy of a check the check drawn on the account of 1894 Realty LLC and made payable to the "NYC Department of Finance," they submit no supporting documents as to existence of the lien and its amount. Since the purpose of plaintiff's payment cannot be ascertained from the face of the check, Ms. Bank's affidavit alone is insufficient to establish that the payment was made to

discharge a lien for water and sewer charges. Further, plaintiffs admit that under the clear and express terms of the lease, defendant was obligated to pay for his *own* water and sewer charges. In reply, plaintiffs concede that they are now seeking to have defendant pay water and sewer charges for the entire building, asserting that since July 2010, defendant and a physical therapy group were the only tenants in the building, and since defendant was operating a restaurant, he was presumably the "largest consumer" of water. Notably, the complaint alleges that defendant installed a water meter on January 30, 2009, but in reply, plaintiffs allege that at the time they sold the building in July 2012, defendant had not yet installed a water meter as required by the lease. In view of these disputed and unresolved issues, plaintiffs have failed to establish prima facie entitlement to summary judgment on their claim for water and sewer charges.

Second as the fire-prevention inspection fees, plaintiffs allege that without their consent, defendant applied for and received DOB permits for work at the premises, including an HVAC permit, defendant performed such work; and as a result the New York City Fire Department performed certain inspections that were charged back to the owner, 1894 Realty LLC. To support such allegations, plaintiffs submit defendant's applications for the DOB permits, copies of the permits issued by DOB and a document from NYCServ, which simply shows that as of March 20, 2012, the owner 1894 Realty LLC owed the amounts of $2,416 and $658.91 for "Fire-Prevention Inspection." Even assuming without deciding that defendant performed HVAC work at the premises, plaintiffs have failed to establish a connection between defendant's work and the inspections performed by the Fire Department. In the absence of such connection, plaintiffs have not provided an adequate basis for imposing liability on defendant for the cost of those Fire Department inspections.

Turning to defendant's opposition to plaintiffs' claim for outstanding base rent, the court concludes that defendant fails to raise an issue of fact as to his obligation to pay base rent or the amount sought as due and owing. Although defendant asserts that he made all 25 rent payments from July 2010 to July 2012, he submits no cancelled checks or other proof of such payments. Defendant also asserts that plaintiffs provided no statements for rent or rent arrears, plaintiffs' demand letters did not mention any rent arrears, and plaintiffs never commenced a non-payment proceeding. Even assuming without deciding that those assertions are true, they nevertheless provide no factual or legal basis to excuse defendant's obligation under the lease to pay base rent in the amount of $5,000 per month. Significantly, the lease contains a no-waiver clause in Paragraph 24. See Jefpaul Garage Corp v. Presbyterian Hospital in City of New York, 61 NY2d 442 (1984); Community Counseling & Mediation Services v. Chera, 96 AD3d 639 (1st Dept 2012). Thus, in the absence of a material issue of fact as to a viable defense, plaintiffs are entitled to summary judgment on their claim for base rent in the amount of $35,000.

Given plaintiffs' failure to make a prima facie showing as to it claims for water and sewer charges and fire-prevention inspection fees, the balance of defendant's opposition need not be considered. See Winegrad v. New York University Medical Center, supra; Oddo v. Queens Village Committee, supra. Nevertheless, the court notes that defendant disputes the amounts claimed for water and sewer charges, and the fire-prevention inspection fees. Specifically, defendant asserts that plaintiffs have failed to provide a "proportionate breakdown" of the $21,427.55 attributable to his usage, and submits a "water use statement" that allegedly attributes 54% usage to his restaurant and 46% to the remainder of the building. Moreover, defendant denies installing any HVAC units and alleges that the 12 existing HVAC units in the building

were installed pursuant to a building permit application filed in December 1990, and submits what he describes as the DOB "filed approved plans cover page" date-stamped received on December 7, 1990. Defendant also explains that the Fire Department Bureau of Fire Prevention requires HVAC units to be permitted and inspected annually and that the Fire Department charges a fee for such inspections. Defendant asserts that he has paid for the annual inspections of the three HVAC units serving his restaurant and submits the invoice he received from the Fire Department for $315.00, covering the period from August 2011 to August 2012. Based on the foregoing, it is clear that triable issues of fact exist as to plaintiffs' claims for water and sewer charges, and fire-prevention inspection fees.

Pursuant to paragraph 19 of the lease, plaintiffs are entitled to partial summary judgment on the issue of liability as to their claim for attorney' fees, and the reasonable amount of such fees shall be determined at trial or at an inquest.

Finally, the branch of plaintiffs' motion to strike the affirmative defenses in defendant's answer is granted in the absence of opposition. Defendant opposes summary judgment, but does not address the portion of plaintiffs' motion for dismissal of his affirmative defenses.

Accordingly, it is

ORDERED that plaintiffs' motion is granted in part and denied in part; and it is further

ORDERED that plaintiffs' motion for summary judgment is granted to the extent that plaintiffs 1894 Realty, LLC and 1894 Eastchester Road Corp. are entitled to summary judgment against defendant Gerald Christopher d/b/a Good to Go Restaurant on their claim for back rent in the amount of $35,000.00, and the Clerk is directed to enter judgment in favor of plaintiffs 1894 Realty, LLC and 1894 Eastchester Road Corp. and against defendant Gerald Christopher d/b/a

Good to Go Restaurant, in the amount $35,000.00, together with interest as computed by the Clerk at the statutory rate from July 1, 2012; and it is further

ORDERED that plaintiffs are entitled to partial summary judgment on the issue of liability with respect to their claim for attorney's fees, and the reasonable amount of such fees shall be determined at trial or at an inquest; and it is further

ORDERED that the branch of plaintiffs' motion to dismiss defendant's affirmative defenses is granted in the absence of opposition, and said defenses are dismissed; and it is further

ORDERED that the branch of plaintiffs' motion for summary judgment on their claims for water and sewer charges, and fire-protection inspection fees, is denied; and it is further

ORDERED that plaintiffs' claims for water and sewer charges, fire-protection inspection fees, and attorneys's fees, are severed and shall continue; and it is further

ORDERED that the parties shall proceed to mediation.

DATED: July 27, 2016

ENTER:

J.S.C.

HON. JOAN A. MADDEN
J.S.C.